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In The

Supreme Court of the United States

October Term, 1981

In the Matter of the Application of MARY E. WINTERS,

Petitioner,

vs.

THEODORE M. BECK, M.D.,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of New York

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

Court of Appeals of the State of New York, June 18, 1981, 185 N.Y.L.J. p. 4, co. 2, denied motion for leave to appeal to the Court of Appeals of the State of New York.

Court of Appeals of the State of New York, April 9, 1981, 55 N.Y. 2d 796 (1981) dismissal by the Court, *sua sponte,* upon the ground that there is no substantial question directly involved.

Supreme Court of the State of New York, Appellate Division, Second Judicial Department, 79 App. Div. 706 (2d 1980), 437 N.Y.S. 2d 925, dismissal of the appeal from the order and judgment appealed from unanimously affirmed.

Supreme Court of the State of New York, County of Westchester, N.R. (15473/79) granting accelerated judgment pursuant to N.Y. Civ. Prac. Law & R. §3211-a-5, in that plaintiff's actions are time-barred by the defense of statute of limitations.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provisions involved are 28 U.S.C. §§1254, 1257 and New York Civ. Prac. Law & R. §§213, 214, 3211-a-5. The constitutional provisions are U.S. Const. amend. XIV, §1 and U.S. Sup. Ct. R. 19.

JURISDICTION

Petitioner has sought to invoke the certiorari and certification jurisdiction of this Court under §§1254(1) and (3) of the Judicial Code, 28 U.S.C. §§1254(1) and (3). However, these sections simply provide no basis for jurisdiction for review of a decision of the Court of Appeals of New York; they apply only to Supreme Court review of decisions of federal courts of appeals. The petition should be dismissed for this reason alone.

STATEMENT OF ARGUMENT

The issue sought to be created in the present case concerns a well-settled area of the law and therefore, does not warrant review by this Court on certiorari. This case concerns the application of a state statute of limitations, as set forth in N.Y.

Civ. Prac. Law & R. §214(6) for an action to recover damages for malpractice. Had the proper jurisdictional provision been employed, the petitioner would nevertheless have failed to present a federal question of substantial importance warranting review by this Court.

A determination of the jurisdiction of the Supreme Court is the initial consideration. The petitioner has, in the instant case, improperly sought to invoke the jurisdiction of this Court under 28 U.S.C. §§1254(1) and (3). However, the decision of the New York Court of Appeals is not a decision of a federal court of appeals to which 28 U.S.C. §1254 refers. Petitioner does not, for reasons known only to it, invoke the Section 1257, which deals with review of state court decisions.[1] Therefore, the provisions cited by petitioner, do not provide any basis on which this Court could properly grant jurisdiction.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

Essential to Supreme Court jurisdiction over state court judgments is that the purported federal question be not only real and non fictitious, but substantial in nature. *Caldwell v. Texas,* 137 U.S. 692 (1891). Even if petitioner had timely and properly made out a federal question, where there is a lack of all color of merit, as in the instant case, the mere fact that it was raised is not a sufficient basis on which to grant Supreme Court jurisdiction. *New Orleans Waterworks Co. v. Louisiana,* 185 U.S. 336 (1902).

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1. Where a state court refuses to reach even a properly raised challenge to a state statute "whose validity was sought to be 'drawn in question,'" the resulting effect leaves the statute "too tangentially involved to satisfy 28 U.S.C. §1257(2) "making certiorari under §1257(3) the only proper method of seeking Supreme Court review of the federal issues." *Garrity v. New Jersey,* 385 U.S. 493, 495-496 (1966).

The question as presented by the petitioner, concerns the application of a state statute of limitations to the specific facts and circumstances surrounding this individual's cause of action, however, petitioner has failed to point out ". . . special hardships or oppressive effects "which have resulted from enforcement of the bar in this case. *Chase Securities Corp. v. Donaldson,* 325 U.S. 304 (1945).

Respondent performed a tubal ligation on the petitioner on or about October 27, 1972. On or about October 4, 1978, the petitioner discovered she was pregnant. On October 9, 1978, the petitioner underwent an uneventful abortion. Suit was commenced by service of a summons and complaint on September 20, 1979, one year and two months following her pregnancy. An amendment to N.Y. Civ. Prac. Law & R. §214 limiting the commencement of actions for medical malpractice to two years and six months of the act, omission or failure complained of, applies to acts of malpractice occurring on or after July 1, 1975. The three year statute of limitations contained in N.Y. Civ. Prac. Law & R. §214 is still applicable to causes of action for medical malpractice based on acts occurring before July 1, 1975. Petitioner's cause of action is based upon alleged negligence and/or breach of contract. The date of the alleged performance and/or breach of contract, and/or medical malpractice is given as October 27, 1972. In the state of New York, actions for breach of contract must be brought within six (6) years following the breach N.Y. Civ. Prac. Law & R. §213. Six years from October 27, 1972 would be October 27, 1978. Actions for negligence must be brought within three (3) years following the commission of the alleged malpractice, N.Y. Civ. Prac. Law & R. §214. Three years from the date given would be October 27, 1975. Computation of the time within which the petitioner should have brought this action, reveals that commencement of this suit on September 20, 1979 falls outside of both dates, and therefore, petitioner's complaint is absolutely time-barred by the applicable statutes of limitations.

The petitioner has misplaced her reliance on cases which in fact stand for the proposition that where the nature and origin of the liability asserted is a negligent act, the bar of the statute of limitations cannot be avoided. That in cases of malpractice, which are essentially negligence cases. ". . . the adoption of and adherence to the accrual rule by the Judges of our court from 1930 onward renders the simple assertion 'it is unjust' inadequate." *Schwartz v. Heyden Newport Chemical Corp.*, 12 N.Y. 2d 212, 237 N.Y.S. 2d 714, *cert. denied*, 347 U.S. 808 (1963); *Victorson v. Block Laundry Machine Co.*, 37 N.Y. 2d 395, 373 N.Y.S. 2d 39 (1975), overruling *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y. 2d 346, 305 N.Y.S. 2d 490 (1969).[2]

The claim that New York's statute of limitations as applied to petitioner results in a denial of due process is incorrect, and contrary to well-settled law in this area.

In 1885, this Court upheld the validity of a statute of limitations against a claim that its application does not violate the Fourteenth Amendment of the Constitution of the United States. *Campbell v. Holt*, 115 U.S. 620 (1885). In 1945, this Court once again upheld the validity of a specific statute of limitations as enacted and applied by a state against claims that it was violative of the Fourteenth Amendment, in the landmark case of *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), rehearing denied June 18, 1945, 325 U.S. 896. Mr.

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2. "Considering the function of a statute of limitations as a device for repose, a potential defendant's equities are the same whether the plaintiff knows of his condition or not. Repose is as beneficial to society in one case as in the other. While the plaintiff's equities are greater in one case, it was presumably pursuant to a determination that the interests of an occasional claimant were subordinate to society's interest in repose that resulted in the statute of limitations in the first place. . . ." *Schwartz*, at p. 718.

Justice Jackson stated, and has often been cited and followed,[3] in his explanation that:

> "statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944) . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. . . .
>
> This Court in *Campbell v. Holt*, adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of

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3. Cited in recent cases concerning statutes of limitations, *Joseph v. Syrian Arab Airlines*, 88 F.R.D. 530 (S.D.N.Y., 1980); *Hopkins v. Kelsey-Hayes, Inc.*, 62 F. 2d 801 (3rd Cir. 1980); *W.B. Coke v. General Adjustment Bureau*, 640 F. 2d 584 (5th Cir. 1981) and *Homcy v. United States*, 536 F. 2d 360 (Ct. Cl., 1976), wherein the court re-emphasized that "the statute of limitations is one of finality, designed to protect parties from stale claims and bar the possibility of court suits after a reasonable time has passed. . . ." *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938).

> limitation go to matters of remedy, not to destruction of fundamental rights. . . ."[4]

And whereas, a due process violation necessarily implies the denial of a fundamental right guaranteed by the Fourteenth Amendment of the Constitution of the United States, in light of the above, the petitioner in the matter before the Court, has improperly claimed a denial of due process.

In considering the petition before the Court, attention is focused on N.Y. Civ. Prac. Law & R. §214, adherence to which effectively bars the ultimate question in this case from being entertained again in New York state. In light of this fact as well as the standards governing the exercise of Supreme Court discretionary power of review upon writ of certiorari, 28 U.S.C. §1257(3), it is incumbent upon this Court to recognize that this case is not one in which there are "special and important reasons" for granting the writ as required:

> "In illustrating the character of reasons which may be deemed 'special and important,' the Rule refers to cases 'where a state court has decided a federal question of substance and not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.' A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy scholarly interest

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4. In *Campbell v. Holt*, at 626, this Court cited to the case of *Townsend v. Jemison*, 9 How. 407, wherein Mr. Justice Wayne summed up in a single sentence, at p. 412, an explanation of the whole question that "the rule in the courts of the United States, in respect to pleas of the statutes of limitation, has always been that they strictly affect the remedy and not the merits."

> in such issues. Nor does it sit for the benefit of the particular litigants . . . 'special and important reasons' imply a reach to a problem beyond the academic or episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion." *Rice v. Sioux City Cemetery*, 349 U.S. 70 at 74 (1955).

While a question may be substantial in the sense that there is a legitimate dispute over whether there is a federal right, the question itself may nevertheless be so unimportant that it is not worthy of Supreme Court review, and in light of Sup. Ct. R. 19, the issue presented by petitioner clearly does not fall within this Court's discretion, and certiorari should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari, should be denied.

Respectfully submitted,

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